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No. 82-1082

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

THOMAS N. RUPE,

Petitioner

v.

RUTH BLAKE AND LOUIS DEKMAR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF WYOMING

BRIEF OF RESPONDENT BLAKE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a prospective juror, previously convicted of a felony, is asked by the prosecutor on voir dire in a criminal case if he has ever been convicted of a felony, and remains silent, is his lack of response protected "speech" under the provisions of 42 U.S.C., §1983?

2. Is a prosecutor's issuance of a press release, containing true public information, concerning an ongoing prosecution, actionable under 42 U.S.C., §1983?

3. Is a prosecutor who files a criminal charge against a defendant liable for damages when the defendant prevails at a preliminary hearing on an affirmative defense?

4. Is the defense of good faith immunity adequately raised by an answer which asserts, among other defenses, that Defendants are immune from liability, are privileged to act as they did pursuant to law, and were privileged in deciding to prosecute?

5. May the defense of good faith immunity be decided as a matter of law, pursuant to *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (decided 24 June 1982)?

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STATEMENT OF THE CASE

Petitioner's "Statement of the case," which makes *no* reference to the record, is vituperative and self-serving in misstating facts to his own advantage, attempting to leave the impression, as he had done in his complaint, that Blake and Dekmar, "motivated by hatred and spite," had "maliciously cooperated" in the filing of the perjury charge. (R. Vol. I, pp. 3-7). Such position and contention is unsubstantiated by the evidence, and, especially as to Dekmar, in direct conflict with the view of the Wyoming Supreme Court:

> "We find no evidence of bad faith or unreasonable conduct by Dekmar; so we must conclude as a mat-

ter of law that he acted reasonably, in good faith in the light of all the circumstances existing at the time." (Petitioner's App. 37)

A *fair*, concise recitation of the facts giving rise to this action is found in Part I of the Wyoming Supreme Court Opinion, (Petitioner's App. 6-9). A more complete statement of the relevant circumstances reflected in the record is the following:

In 1979, Petitioner Rupe was called for jury duty in two criminal cases in Converse County District Court, Douglas, Wyoming wherein Blake was the prosecuting attorney.

Mr. Rupe, along with other jurors, was twice interrogated concerning his qualifications as a juror, once in each case. This questioning included the usual inquiry as to the juror's status, under §§1-11-102 and 1-11-103 W.S. 1977, which states that a person who has been convicted of a felony is disqualified to act as a juror. The prosecutor read §1-11-103 which concludes, "a person is disqualified to act as a juror if he has been convicted of any felony." Mr. Rupe in both cases, failed to indicate that he had been convicted of a felony. (R. Vol. VI, Plaintiff's Ex. 101, 102, App. 2a, 6b.)

In the Voir Dire of the panel, the prosecutor said to the prospective jurors (R. Vol. VI, Plaintiff Ex. 102, p. 10, App. 11b) "If you have been convicted of a felony, or if you're a qualified resident [Sic], does anyone have something that should be brought to the attention of the Court at this time?" The prosecutor addressed Mr. Rupe personally and said, "Do you know Mr. Roop [Sic] of any reason why you could not serve as a juror?" Mr. Rupe answered "Nothing other than I asked to be relieved by the City Engineer." (R. Vol. VI, Plaintiff's Ex. 102, p. 13, App. 13b.) Later the Trial Judge said to the entire panel, "The County and Prosecuting Attorney had covered the matter as to whether or not if anyone has been convicted of a felony. I want them to come to the bench and let me know." (R. Vol. VI, Plaintiff's Ex. 102, p. 10, App. 11b.)

Following the trial Prosecuting Attorney Blake was informed that Mr. Rupe had previously been convicted of a felony, whereupon the prosecutor, Ms. Blake called the

Wyoming State Penitentiary on the telephone to ascertain if that institution had any record of Mr. Rupe. She was told that it had a record and that he had served time there, having been convicted out of Natrona County, Wyoming. (R. Vol. III, p. 559.) She testified that she was told that the records of the penitentiary "did not show any indication of a pardon." (R. Vol. III, p. 559.) She then called the Clerk of Court of Natrona County asking if there was any record of a pardon in the file and received a negative response. Later, to satisfy herself she made a 50 mile trip to the Natrona County Clerk of Court's office in Casper, Wyoming to review the file and found no evidence of a pardon. (R. Vol. III, (IV), p. 569.)

Prosecutor Blake did not make any inquiry at the Secretary of State's office or the State Archives in Cheyenne, Wyoming. On the basis of the investigation which she and her investigator Dekmar had made she requested Dekmar to file a perjury complaint against Mr. Rupe, with which request Dekmar complied.

Mr. Rupe was not arrested, but was advised that a warrant had been issued for him. He appeared at the Sheriff's Office voluntarily to pick up the Warrant and appeared at the preliminary hearing voluntarily. At the hearing Mr. Rupe's counsel presented evidence of the Certificate of Restoration of Rights issued by the Governor at the time of Mr. Rupe's release from the penitentiary. This was the first time that either Prosecutor Blake or Dekmar had known of the existence of the Release. The Justice of Peace, on the basis of the Governor's Certificate, dismissed the perjury complaint and this action resulted, Petitioner filing a twelve page, ten count Complaint, asserting various torts and a cause of action for violation of his Civil Rights.

Defendants filed a Motion To Dismiss and later answered Plaintiff's Complaint alleging among others, the following defenses:

> "30. As a further and separate defense, Defendants allege that they are immune from liability.

31. As a further and separate defense, Defendants allege that they were privileged to act as they did pursuant to law.

32. As a further and separate defense to Plaintiff's First Cause of Action [42 U.S.C. 1983], Defendants assert that a prosecutor and her assistant in making a decision to prosecute are clothed with absolute immunity.

* * *

35. As a further and separate defense to Plaintiff's Fifth Cause of Action, Defendants assert that Defendants Blake and Dekmar were privileged in deciding to prosecute Plaintiff.

* * *

40. As a further and separate defense, Defendants allege that Plaintiff's damages, if any, resulted from his previous conviction of a felony and that a convicted felon does not have any protectable right to have his past infamous deeds left unexposed." (R. Vol. I, pp. 66-67.)

On trial of the cause, the court, at the close of Plaintiff's evidence, granted Defendant's Motion to dismiss the Civil Rights cause of action under 42 U.S.C., §1983, but overruled Defendants' other Motions and submitted the tort claims to the jury, which returned a verdict in favor of Rupe against both Prosecutor Blake and Investigator Dekmar.

On appeal and cross-appeal, the Wyoming Supreme Court held that Prosecutor Blake was entitled to absolute immunity and her motion to dismiss should have been granted; and that, since Investigator Dekmar was entitled to qualified immunity under the circumstances, a directed verdict should have been granted at the close of Plaintiff's evidence.

WHEN A PROSPECTIVE JUROR, PREVIOUSLY CONVICTED OF A FELONY, IS ASKED BY THE PROSECUTOR ON VOIR DIRE IN A CRIMINAL CASE, IF HE HAS EVER BEEN CONVICTED OF A FELONY, AND REMAINS SILENT, HIS LACK OF

RESPONSE IS NOT PROTECTED "SPEECH" UNDER THE PROVISIONS OF 42 U.S.C., §1983.

Petitioner contends that his First Amendment rights were violated because he was penalized by the bringing of perjury charges against him when he failed to disclose the fact of his prior felony conviction at the time he sat as a juror being impaneled to hear two different murder cases.

Such a position is not justified. It is unquestioned that he had been convicted of a felony, and, at the time he was interrogated, did not know of any Certificate from the Governor (R. Vol. III, p. 508-510, App. 14c-17c). He misrepresented his status in two ways, first, by not answering the prosecutor's question to the panel regarding a felony conviction, and, second, by his oral response to the inquiry as to any reason he could not serve as a juror. Additionally he failed to obey the Judge's admonition to all members of the panel to come to the bench and let him know if "anyone has been convicted of a felony." (R. Vol. VI, Plaintiff's Ex. 102, pp. 1-13, App. 11b-13b.)

Apparently, Petitioner would rewrite the law to "protect a man in falsely shouting fire in a theater and causing a panic." *Shenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L. Ed. 47. Such a result would not be good policy, would not be good law, and should not be countenanced. Certainly the State's interest in providing impartial jury trials to an accused in a criminal matter outweigh Petitioner's interest in making false utterances.

The law is clear. 16A Am. Jur. 2d, *Constitutional Law*, §511, *Unprotected Utterances, generally*, states the following:

> "The protective cloak of the constitutional freedoms of speech and press is, as has been noted, limited in its scope; and the unconditional phrasing of the First Amendment is not intended to protect every utterance. To quote Justice Holmes' famous saying 'most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic,' nor would it preclude

expulsion of hecklers from assemblies, or permit religious worship to be disturbed by those anxious to preach a doctrine of atheism. The constitutional guaranties do not permit unrestricted utterances or publication of remarks or literature which blasphemous or profane, obscene, fraudulent, or otherwise injurious or harmful. Moreover, it cannot be claimed that under these freedoms there is a right to publish, or any individual is free to utter, libels and slanders . . . .

The constitutional rights and liberties of speech and press are also subject to the right of judicial tribunals to punish as for contempt where an utterance or publication tends to obstruct the courts in their administration of justice. And, under its police power, a state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare or safety."

As the United States Supreme Court has noted in *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d, 789, 805

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wideopen' debate on public issues. New York Times Co. v. Sullivan, 376 US at 270, 11 L Ed 2d 686, 95 ALR2d 1412. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766 (1942)."

To a similar effect this Court, in *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1653, 60 L.Ed. 2d 115, 131 said, "spreading false information, in and of itself, carries no First Amendment credentials."

Here, Petitioner Rupe had been convicted of a felony, and both by his silence and his response under oath indicated that he had not been convicted. Such false speech is not constitutionally protected.

THE PROSECUTOR'S ISSUANCE OF A PRESS RELEASE, CONTAINING TRUE PUBLIC INFORMATION, CONCERNING AN ONGOING PROSECUTION IS NOT ACTIONABLE UNDER 42 U.S.C., §1983.

The press release which is now alleged to have violated Petitoner's rights is set forth as Footnote 7 on Petitioner's Petition Appendix p. 26. The statements contained therein are all *true* as reflected in the Trial Transcripts. Even so, Petitioner claims release of this information violated his rights.

This Court has had occasion to answer Plaintiff's assertions in the case of *Paul v. Davis*, 424 U.S. 693, 712-713, 96 S.Ct. 1155, 47 L.Ed. 2d, 405, 420, where the Court said:

> "Respondent's complaint also alleged a violation of a 'right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.' The Court of Appeals did not pass upon this claim since it found the allegations of a due process violation sufficient to require reversal of the District Court's order. As we have agreed with the District Court on the due process issue, we find it necessary to pass upon respondent's other theory in order to determine whether there is any support for the litigation he seeks to pursue.
>
> While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon governmental power.

See Roe v Wade, 410 US 113, 152-153, 35 L Ed 2d 147, 93 S Ct 705 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967); Terry v Ohio, 392 US 1, 8-9, 20 L Ed 2d 889, 88 S Ct 1868 (1968). And our other 'right to privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In Roe the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in Palko v Connecticut, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

Respondent's claim is far afield from this line of decisions. *He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based*, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead *on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.*" (Emphasis supplied.)

A PROSECUTOR WHO FILES A CRIMINAL CHARGE AGAINST A DEFENDANT IS NOT LIABLE

FOR DAMAGES WHEN THE DEFENDANT PREVAILS AT A PRELIMINARY HEARING ON AN AFFIRMATIVE DEFENSE.

As previously noted, the record reveals that prior to the preliminary hearing held on the perjury charge, not even the Petitioner was aware that there was a letter restoring certain of his civil rights due him. (R. Vol. III, pp. 508, 513, App. 14c-17c.) Petitioner's attorney at the preliminary hearing produced a letter which he found in the state archives *allegedly* restoring certain rights to Petitioner, possibly including the right to sit on a jury. See Justice Rooney's concurrence (Petitioner's App. pp. 51-55), questioning the constitutionality of the restoration of rights statute.

Needless to say, there is no evidence that the prosecutor did anything improper in filing charges against the Petitioner. The record is definite that she was not aware of the Governor's letter prior to filing charges. (R. Vol. III, pp. 559-569.)

This Court recently analyzed a similar situation in *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed. 2d 433, 442, 443, as follows:

> "Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights 'without limits.' Patterson v New York, 432 US 197, 208, 53 L Ed 2d 281, 97 S Ct 2319 (1977). 'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' Ibid.
>
> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only

against deprivations of liberty accomplished 'without due process of law.' A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers—all of whom may be potential defendants in a §1983 action—is entirely consistent with 'due process of law.' . . . Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury."

Even leaving aside the question of immunity, Petitioner failed to state a claim against the prosecutor.

As to the immunity argument, it is clear that a prosecutor who initiates a prosecution is immune from liability to the defendant because the defendant prevails at preliminary hearing or at trial. If the rule were otherwise, there would be a dearth of prosecutors willing to accept the problems and financial losses incident to certain inevitable unsuccessful prosecutions. As was said in the leading case of *Imbler v. Pachtman*, 424 U.S. 409 at 424, 425, 96 S.Ct. 984, 47 L.Ed. 2d 128, 140, 142, 143.

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution . . . . Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. Bradley v Fisher, 13 Wall, at 348, 20 L Ed 646; Pierson v Ray, 386 US at 554, 18 L Ed 2d 288, 87 S Ct 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would

be diverted from the pressing duty of enforcing the criminal law. . . .

We emphasize that the immunity of prosecutors from liability in suits under §1983 does not leave the public powerless to deter misconduct or to punish that which occurs . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

It remains to delineate the boundaries of our holding. As noted, supra, at 416, the Court of Appeals emphasized that each of respondent's challenged activities was an 'integral part of the judicial process.' 500 F2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. See Pierson v Ray, 386 US at 557, 18 L Ed 2d 288, 87 S Ct 1213. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.[32] . . .

fn. 32 Both in his complaint in District Court and in his argument to us, petitioner characterizes some of respondent's actions as 'police-related' or investigative. Specifically, he points to a request by respondent of the police during a courtroom recess that they hold off questioning Costello about a pending bad-

check charge until after Costello had completed his testimony. Petitioner asserts that this request was an investigative activity because it was a direction to police officers engaged in the investigation of crime. Seen in its proper light, however, respondent's request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate."

In this case, there was no evidence of any activities taken by Blake or her investigator outside of the prosecutorial function.

THE DEFENSE OF GOOD FAITH IMMUNITY WAS ADEQUATELY RAISED BY THE DEFENDANT'S ANSWER.

The Defendants' answer, among other defenses, asserted the following:

30. As a further and separate defense, Defendants allege that they are immune from liability.

31. As a further and separate defense, Defendants allege that they were privileged to act as they did pursuant to law.

32. As a further and separate defense to Plaintiff's First Cause of Action [42 U.S.C., §1983], Defendants assert that a prosecutor and her assistant in making a decision to prosecute are clothed with absolute immunity.

35. As a further and separate defense to Plaintiff's Fifth Cause of Action, Defendants assert that Defendants Blake and Dekmar were privileged in deciding to prosecute Plaintiff.

Despite this clear pleading, the Petition of Rupe boldly states:

"The final issues presented in this case deal with the Wyoming Supreme Court's award of judgment to the Defendant Dekmar, the prosecutor's investigator, based on an immunity he had never asserted . . . . In this case the Plaintiff was given

no notice that the investigator asserted a qualified immunity of 'good faith.' The investigator never did assert it." (Petitioner's Brief, pp. 10, 11.)

A review of these paragraphs of Defendants' Answer belies Petitioner's regard for the record. Plaintiff was fairly advised that Defendants claimed to be acting in good faith.

Defendants continued to raise specifically the good faith immunity of their actions, in their tendered instructions prior to trial (with supporting citations). Defendants Instruction Nos. 21 and 32 are as follows:

"INSTRUCTION NO. 21

You are instructed that if you find that Louis Dekmar and Ruth Blake believed in good faith that their conduct was lawful, and that belief was reasonable, then you must find for Defendants Ruth Blake and Louis Dekmar on Plaintiffs claims for violation of his civil rights.

GIVEN: _____

_____

PAUL T. LIAMOS
District Judge

Rodart v. City of Riverton, Wyo. 552 P.2d 1245; *Pierson v. Ray*, 386 U.S. 547." (R. Vol. I, p. 236)

"INSTRUCTION NO. 32

You are instructed that Defendants are entitled to immunity from any liability for their actions even though their actions may amount to a constitutional violation if you find:

(1) That they acted without malice and without actually realizing that their conduct would violate the Plaintiff's constitutional rights, and

(2) That, although they did not actually know that they were violating Plaintiff's constitutional

rights, their failure to know was not unreasonable under all the circumstances.

GIVEN: _____

_____

PAUL T. LIAMOS
District Judge

Johnson v. Anderson, 420 F.Supp 845 (D.C. Del. 1976); *Wren v. Jones*, 457 F.Supp 234 (S.D.ILL. 1978); *Wood v. Strickland*, 420 U.S. 308 (1975)." (R. Vol. I, p. 247)

Indeed, Petitioners have admitted that they were aware of the immunity defense from the beginning. In their 1 June 1981 letter to the trial judge they wrote:

> "It has always been clear to the Plaintiff that the only defense which the Defendants could offer, was that their malicious and reckless conduct was immune from suit. That continues to be the thrust of the Defendants as we move into the post trial phase of this litigation." (R. Vol. II, p. 396)

Petitioners now claim that they were denied an opportunity to litigate Defendants' good faith. The standard against which the adequacy of Defendants' answer is to be measured is set forth in F.R.C.P. Rule 8 wherein it is stated:

> "(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies . . . .
>
> (e) Pleading to be Concise and Direct; Consistency.
>
> (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motion are required."

Wright and Miller, *Federal Practice and Procedure*, Vol. 5, §1274 describes the effect of Rule 8 as follows:

"§1274. Pleading Affirmative Defenses

The general rules of pleading that are applicable to the statement of a claim also govern the statement of affirmative defenses. As one district court has remarked: 'I have no doubt that the requirements for an affirmative defense are no more stringent than those for a complaint . . . Thus, the pleading standards set out in Rule 8(e) must be consulted in connection with drafting affirmative defenses under Rule 8(c). *An affirmative defense may be pleaded in general terms and will be held to be sufficient, and therefore invulnerable to a motion to strike, as long as it gives plaintiff fair notice of the nature of the defense.*"

(Emphasis supplied.)

At §1281 the Wright and Miller treatise notes:

"STANDARDS FOR PLEADING

§1281. Averments in Pleadings to be Simple, Concise, and Direct

Rule 8(e)(1) makes it clear that technical forms of pleading no longer have a place in federal practice by requiring a pleader to set forth his averments in a simple, concise, and direct manner. The rule basically is designed to provide a general guideline indicating the structure and language a party should use in framing his pleadings. In this connection it supplements Rules 8(a), (b), and (c), which are more directly concerned with the substantive content of the pleadings, and Rule 10, which sets forth certain requirements of form that a party should comply with in drafting his pleadings.

The effect of Rule 8(e)(1) is to give a party great flexibility in framing his pleadings. *Neither technical expressions nor any particular form of words is required. A pleader is free to select language that he believes most simply and clearly sets forth his claims*

or defenses. By including a provison such as Rule 8 (e)(1) the draftsmen of the federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued common law and code practice.

A party should set forth the averments in his pleadings in general terms. As is discussed elsewhere, present federal pleading practice largely serves the function of apprising the opposing parties of the nature of the litigation and the claims or defenses that are being raised by the suit. Consequently, a party need only plead in terms that are sufficient to provide the necessary notice to his adversary. The evidentiary material supporting these general statements normally should not be set out in pleadings but rather should be left to be brought to light during the discovery process. For example, in a suit alleging liability for the act of an agent it is sufficient simply to assert the existence of an agency relationship without setting forth the contract of agency or details about the relationship in the pleadings, inasmuch as the terms of the agency are evidentiary in nature." (Emphasis supplied.)

Here, in addition to specifically alleging prosecutorial immunity, Defendants alleged immunity and privilege. They did not need to set forth the different elements that had to be proved to establish these claims.

As was said by this Court in *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed. 2d 572, 578:

". . . Thus we have stated that '[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.' Scheuer

v Rhodes, supra, at 247-248, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474. The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right.' Wood v Strickland, supra, at 321, 43 L Ed 2d 214, 95 S Ct 992."

Under this *Gomez* criteria, Defendants' answer advised Plaintiff that each of them had been "acting sincerely and with a belief that he is [was] doing right."

Their answer certainly gave fair notice of the nature of their defense and was in compliance with F.R.C.P. 8(c).

Defendants, prior to the trial, submitted instructions specifically setting forth good faith immunity. They fully complied with F.R.C.P. Rule 8. Indeed, they specifically followed the method deemed preferable by Wright and Miller. Petitioner admitted "it has always been clear to the Plaintiff" that the Defendants claimed they were "immune from suit." Petitioners are not sincere in their claimed lack of notice of an unasserted defense.

THE DEFENSE OF GOOD FAITH IMMUNITY CAN BE DECIDED AS A MATTER OF LAW.

Even if one were to believe Petitioner's statements that he was not put on notice of immunity being an issue and adequately raised by the pleadings, this court's most recent pronouncement in the area supports the Wyoming Supreme Court's decision which ruled on qualified immunity as a matter of law. In *Harlow v. Fitzgerald*, _____ U.S. _____, 102 S.Ct. 2727 (1982), 73 L.Ed. 2d 396, 408, this Court said:

"In identifying qualified immunity as the best attainable accommodation of competing values, in Butz, supra, at 507-508, 57 L Ed 2d 895, 98 S Ct 2894, as in Scheuer, 416 US, at 245-248, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474, we relied on the assumption that this standard would permit '[i]nsubstantial lawsuits [to] be quickly terminated.' 438 US, at 507-508, 57 L Ed 2d 895, 98 S Ct 2894;

see Hanrahan v Hampton, 446 US 754, 765, 64 L Ed 2d 670, 100 S Ct 1987 (Powell, J., concurring in part and dissenting in part).[23] Yet petitioners advance persuasive arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—*requires an adjustment of the 'good faith' standard established by our decisions.*

Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official. Gomez v Toledo, 446 US 635, 64 L Ed 2d 572, 100 S Ct 1920 (1980). Decisions of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' Wood v Strickland, 420 US 308, 320, 43 L Ed 2d 214, 95 S Ct 992 (1975). The subjective component refers to 'permissable intentions.' Ibid. Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury . . . .' Id., at 321-322, 43 L Ed 2d 214, 95 S Ct 992.

The subjective element of the good faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for

summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Consistently with the balance at which we aimed in Butz, *we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.* See Procunier v Navarette, 4334 US 555, 565, 5 L Ed 2d 24, 98 S Ct 855 (1978); Wood v Strickland, supra, 420 US, at 321, 43 L Ed 2d 214, 95 S Ct 992.[30]

fn.32. The importance of this consideration hardly needs emphasis. This Court has noted the risk imposed upon political officials who must defend their actions and motives before a jury. See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 US 391, 405, 59 L Ed 2d 401, 99 S Ct 1171 (1979); Tenney v Brandhove, 341 US 367, 377-378, 95 L Ed 1019, 71 S Ct 783 (1951). As the Court observed in Tenney, 'In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed.' 341 US, at 378, 95 L Ed 1019, 71 S Ct 783.

fn.30. This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under §1983. We have found previously, however, that 'it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials.' Butz

v. Economou, 438 US, at 504, 57 L Ed 2d 895, 98 S Ct 2894.

Our decision in no way diminishes the absolute immunity currently available to officials whose functions have been held to require a protection of this scope." (Emphasis supplied.)

Notably, Petitioner did not refer to this most recent discussion regarding good faith immunity, wherein this Court rejected the argument that the "good faith" of Defendants required a jury determination.

CONCLUSION

Petitioner misrepresents the facts developed by the evidence and makes no reference to the record below. His knowing misstatements are directed at a substantiation of claims in his complaint, which were *not* proved.

Notably, he fails to mention this Court's most recent pronouncements as they affect the issues he presents. He states that immunity was not raised as a defense, when the answers, as well as other procedural occurrences, disclose that immunity, both absolute and good faith, were predominant issues in the litigation. His castigation of the Wyoming Supreme Court is wholly unwarranted and unsupported.

Likewise, examination of the cases he cites in an effort to show a conflict between circuits (Petitioners Br., p. 9) reveals that there is *no* conflict. The cases, which relate to a prosecutor's press releases concerning true accounts of court proceedings, protect the releasing prosecutor by absolute immunity. Conversely the release of false or premature information (as of an ongoing grand jury proceeding) is unprotected, or, at most, protected by qualified immunity. A fair review shows that holdings of the different circuits are uniform in this respect. Hence, there is no occasion for Petitioner's specious contention.

The record discloses that both immunity and privilege were raised by Defendants, in the manner suggested by leading authorities. The record further reveals that, prior

to trial, in accordance with Wyoming Rules of Civil Procedure Rule 51, explicit instructions on good faith immunity were presented to both the Court and counsel.

The Petition for Certiorari is not sincere. Certiorari should be denied and Respondents should be awarded their costs, pursuant to 42 U.S.C. §1988, in defending against this expensive, unreasonable, vexatious and groundless appeal.

Respectfully submitted,

GLENN PARKER
JAMES L. APPLEGATE
HIRST & APPLEGATE
200 Boyd Building
Cheyenne, Wyoming 82001
Attorneys for Respondent
Ruth Blake

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF CONVERSE, STATE OF WYOMING

Criminal Action No. 2709

- - - - -

THE STATE OF WYOMING,)
)
Plaintiff,)
)
v.)
)
DONEL D. GORMAN,)
)
Defendant.)

- - - - -

The above-entitled matter came on for trial on Monday through Friday, August 6 through 10, 1979, at the Converse County Courthouse, Douglas, Wyoming, before the Honorable George P. Sawyer, District Judge of the Eighth Judicial District of Wyoming, and a jury of twelve.

Said proceedings were reported by Thomas D. Browning, Official Court Reporter to said court, by the use of machine shorthand.

APPEARANCES

Appearing on behalf of the State was Ms. Ruth Blake, County and Prosecuting Attorney for the County of Converse, Douglas, Wyoming.

Appearing on behalf of the Defendant were Messrs. Raymond I. Hunkins and William R. Jones, Attorneys at Law, Wheatland, Wyoming.

WHEREUPON:

THE COURT: Court is in session. Madam Clerk, will you please call the roll of the jurors?

(The following are excerpts only, separated by a row of asterisks. Portions only prepared at request of ordering counsel.)

* * * * *

CLERK OF THE COURT: Thomas N. Rupe?

MR. RUPE: Here.

* * * * *

THE COURT: Many of you have been tested and qualified to serve as jurors, but we have quite a few new ones that have not been tested and qualified, so those of you that have not been tested and qualified to serve as jurors, will you please stand and—the ones that have not, the new ones.

(Prospective jurors were duly sworn.)

THE COURT: Miss Blake, will you please test the panel as to their qualifications to serve as jurors?

MS. BLAKE: Yes, your Honor. Thank you very much.

As prospective members of the jury panel, I would like to read to you the qualifications of a juror from the Wyoming Statutes:

A person is competent to act as a juror if he is, first, an adult citizen of the United States who has not reached the 73rd birthday and who has been a resident of the State one year and of the County 90 days before being selected and returned;

(ii) In possession of his natural faculties, or ordinary intelligence and not decrepit; and

possessed of sufficient knowledge of the English language.

According to Wyoming Statute 1-11-102, a person is disqualified to act as a juror if he has been convicted of any felony.

Certain persons are exempt to serve as jurors under Section 1-11-103 which states a person is exempt from liability to act as juror if the court finds that the provisions of Wyoming Statute 1-11-104 apply or for any other compelling reasons or if a person is:

First, a salaried and active member of an organized fire department or an active member of a police department of a city, town or law enforcement agency of the county or state; or an elected public official.

According to Section 1-11-104, a juror may not be ex-

cused for a trivial cause or hardship or inconvenience to his business, but only when material injury or destruction to his property or property entrusted to him is threatened or when the health or sickness or death in the family requires his absence. In addition to the above causes, a woman may be excused from jury duty when household duties or family obligations require her absence.

Because of these qualifications and the list of the persons who may be exempt to serve as jurors, I would like to ask you a few questions. If any of the answers to these questions tend to be embarrassing, then would you please let us know at that time, and it can be discussed in the judge's chambers, with the Court's permission.

Going back over the statute, the qualifications that I read to you, in legal language, let me first summarize.

First, you must be an adult citizen of the United Stated. Is there anyone here who is not an adult citizen of the United States?

* * * * *

MS. BLAKE: And if there is a felony conviction in any prospective jurors background, that person would also be disqualified. Is there anyone here that would fall in that category?

Your Honor, the State would pass these prospective jurors.

* * * * *

THE COURT: Madam Clerk, will you please draw 12 names to form a jury, and then two for two alternate jurors?

As your names are called, will you please take the empty chair in the top row of the jury box furthest to your right, and continue in that manner until the box is full. The first 12 called will be the initial 12. The last two will be for alternates. So the first one called, then, will go in the corner over here.

CLERK OF COURT: Charles E. Baird.

MR. JONES: Would you read their number, please?

CLERK OF COURT: He is No. 4.

Janet Davis, and she is No. 9. Steve Orzilac, and he is No. 28. Thomas N. Rupe, and he is No. 37. Christal M. Harman; she is No. 15.

* * * * *

THE COURT: Miss Blake, as County and Prosecuting Attorney, will you please examine the prospective jurors for cause, and I will caution the members of the jury that you will probably be asked if you have formed or expressed an opinion. In answering that question, you are not to say what that opinion is, only yes or no; and I will ask all prospective jurors, the rest of the panel, whether you are in the jury box or not, listen to the questions and statements of counsel and the Court as it makes for a much more expeditious voir dire examination, saves quite a bit of time.

All right, Miss Blake, you may proceed.

* * * * *

(Mr. Rupe was asked no direct questions individually on voir dire.)

MS. BLAKE: Is there any other reason that you know of, whatsoever, that has not been brought out, that you feel that you cannot act as a fair and impartial juror?

Thank you very much.

The State would pass these prospective jurors, your Honor.

* * * * *

(Proceedings had were reported in full. Portion only contained herein pursuant to direction or ordering counsel.)

I, Thomas D. Browning, do hereby certify that the foregoing portions are true and correct.

Dated November 9, 1979, at Torrington, Wyoming.

Official Court Reporter

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF CONVERSE, STATE OF WYOMING

Criminal Action No.

- - - - -

THE STATE OF WYOMING,)
)
Plaintiff,)
)
v.)
)
DEREK PARKHURST AND)
DENNIS PARKHURST,)
)
Defendants.)

- - - - -

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter having come on to be heard at Douglas, Converse County, Wyoming, on the 19th day of September, 1979, at the hour of approximately 10:00 o'clock, A.M., said cause being tried before the Honorable George Sawyer, Judge of the Eighth Judicial District of Wyoming, presiding, and a jury panel.

The testimony and proceedings were taken down in shorthand by Antonio H. Villela, Official Court Reporter Pro Tempore, in and for the Eighth Judicial District of Wyoming.

APPEARANCES:

For the State:

Ruth Blake
County & Prosecuting Attorney
for Converse County

Frank Chapman
Public Defender
for the State of Wyoming

QUALIFICATIONS OF JURY PANEL

* * * * By Order of the Court, the Clerk of District Court swears the perspective jurors in to answer all questions put them concerning their qualifications truthfully. * * * *

BY THE COURT: Mrs. Blake, as the County and Prosecuting Attorney will you please test the new members of the jury panel, to test them as to their qualifications to serve as jurors.

BY MS. BLAKE: Yes, your Honor, thank you. May it please the court.

BY THE COURT: Mrs. Blake.

BY MS. BLAKE: Ladies and gentlemen, all of you, and the ones of you who are standing a moment ago I am particularly addressing. I am not certain which one of you I should be talking to, because there are so many new faces here.

What I need to ask you is information regarding your qualifications as jurors. There are certain matters that are set by statute as who you are and what qualifications you must meet before you can serve as jurors. Let me read some of those to you from Section 1-11-101 of Wyoming Statutes. (Reading)

"A person is competent to act as juror if he is: an adult citizen of the United States who has not reached his seventy-third birthday, and who has been a resident of the state one (1) year and of the county ninety (90) days before being selected and returned; in possession of his natural faculties, of ordinary intelligence and not decrepit; and possessed of sufficient knowledge of the English language." (End of Reading)

Section 1-11-103 requires, or sets out that (Reading) "A person is disqualified to act as juror if he has been convicted of any felony." (End of Reading)

Certain person maybe exempt from jury duty, and this is set out in Section 1-11-103, (Reading) "A person is exempt from liability to act as juror if the Court finds that the provisions of Wyoming Statute 1-11-104 apply, or for any other compelling reasons or if a person is: a salaried and active

member of an organized fire department or an active member of a police department of a city, town or law enforcement agency of the county or state; or an elected official." (End of Reading)

Section 1-11-104 furthers provides, (Reading) "A juror may not be excused for a trivial cause or for hardship or inconvenience to his business, but only when material injury or destruction to his property or property entrusted to him is threatened, or when his health or the sickness or death of a member of his family requires his absence. In addition to the above causes, a woman may be excused from jury duty when household duties or family obligations require her absence." (End of Reading)

Those are the qualifications, those are the exemptions. Going back over those then let me ask is there any one today who's beyond their seventy-third birthday?

BY THE REPORTER: (No response shown)

BY MS. BLAKE: Is there anyone who has not been a resident of the State one year and of the County 90 days?

BY THE REPORTER: (No response shown)

BY THE COURT: Mrs. Blake, we have just had one party come through the door. Go ahead and have him sworn.

(Clerk swears potential juror)

BY THE COURT: Mr. More (Phonetic) raise your right hand. You may continue Mrs. Blake. Ask him the question about age. I am sure he qualifies. I think that is the only question.

BY MS. BLAKE: I will, your Honor, thank you. Mr. More, you're not beyond your seventy-third birthday?

BY MR. MORE: No, ma'am.

BY MS. BLAKE: You have been a resident of the State for one year and of the County for 90 days, is that right?

BY MR. MORE: Yes.

BY MS. BLAKE: Okay, fine. Are all of you in possession of your natural faculties, is that right? By that I am talking about your sight, your hearing, by that I mean your ordinary

five senses, or as they are known. Is there anyone that has a hearing problem?

BY UNIDENTIFIED JUROR: I am deaf in one ear, does that make any difference?

BY THE REPORTER: Your name, sir?

BY THE JUROR: Robert Holden.

BY MS. BLAKE: Sir, are you not having difficulty hearing me?

BY MR. HOLDEN: No, ma'am.

BY MS. BLAKE: I think you're okay.

BY THE COURT: Mr. Holden I would ask you if you have trouble normally hearing out of the other ear. In other words you can hear testimony that would be given from the witness stand?

BY MR. HOLDEN: If it is as loud as presently spoken, yes.

BY THE COURT: All right. I think that is sufficient.

BY MS. BLAKE: Is there someone else?

BY UNIDENTIFIED JUROR: I have the same problem, I can't hear out of my left ear.

BY MS. BLAKE: Are you able to hear sufficiently well with the use of one ear if someone is on your left to hear what they are saying?

BY THE REPORTER: Your name ma'am, please.

BY UNIDENTIFIED JUROR: Esther Marshall.

BY MS. BLAKE: If they are on that side?

BY MS. MARSHALL: If they on this side, I can't.

BY MS. BLAKE: Does this create any real problem?

BY MS. MARSHALL: It does. It really does.

BY MS. BLAKE: Do you have to be looking at the people to understand what they are saying?

BY MS. MARSHALL: Most generally they, I have to have my face turned in order to hear.

BY THE COURT: If you were listening from a witness from the witness chair would you be able to hear by turning your head?

BY MS. MARSHALL: I don't very usually. I can hear out

of the left one, not this one at all.

BY MS. BLAKE: How long have you been, had this problem?

BY MS. MARSHALL: About ten years.

BY MR. CHAPMAN: Your Honor, I have no objection to Mrs. Marshall being excused.

BY THE COURT: If you feel you can't hear well enough to listen to the witnesses there I would excuse you.

BY MS. MARSHALL: I honestly believe I couldn't do it Judge.

BY THE COURT: All right. We'll excuse you then Mrs. Marshall. You may leave at this time.

BY MS. MARSHALL: May I do so?

BY THE COURT: You may continue.

BY MS. BLAKE: Is there anyone else that is experiencing any kind of problem?

MR. ARSMICK: Yes, I am deaf in my left ear, but I can hear.

BY THE COURT: You can compensate for that by turning your head?

MR. ARSMICK: Yeah.

BY THE COURT: All right. That will be fine then, you may be seated.

BY UNIDENTIFIED JUROR: Yes, I am partially deaf in one ear. I can get along if you speak up. I don't have any problem then.

BY MS. BLAKE: What is your name, sir?

BY UNIDENTIFIED JUROR: Larry Mason.

BY MS. BLAKE: Are you able to hear sufficiently, Mr. Mason?

BY MR. MASON: I hear you real good. If you don't speak up I have trouble hearing, otherwise I don't have any problem.

BY THE COURT: If you were chosen as a juror you can always raise your hand if it's difficult to hear and we can have the witness speak up, should one of them not do so. I think it should be no problem.

BY MS. BLAKE: Is there anyone else that has such prob-

lems as we have been discussing? I presume you are all. Or at least of ordinary intelligence? Anybody want to confess to anything less?

Is there anyone in the courtroom who is decrepit, in other words not able to get around well?

BY UNIDENTIFIED JUROR: Mrs. Blake, I've got poor circulation. I have to bring a stool. If I let my feet hang too long I have trouble. May I bring a stool if I may?

BY MS. BLAKE: Your name?

BY UNIDENTIFIED JUROR: Mary Jimenez.

BY MS. BLAKE: You don't have any difficulty getting around, it's just when you sit?

BY MS. JIMENEZ: Yes.

BY MS. BLAKE: Are you all possessed with sufficient knowledge of the English language, is that correct?

BY THE REPORTER: (No response shown)

BY MS. BLAKE: Do we have any salaried active members of the Fire Department?

BY THE REPORTER: (No response shown)

BY MS. BLAKE: Or a law enforcement agency?

BY UNIDENTIFIED JUROR: I am not in a law enforcement agency I am with Burns Security.

BY MS. BLAKE: No, that's fine. Do we have any elected officials, public officials?

BY UNIDENTIFIED JUROR: I am on the school board, Dick Paxton.

BY MS. BLAKE: Are your duties sir that they entail your attendance for the next two week?

BY MR. PAXTON: That's kind of hard to answer, probably not.

BY THE COURT: I think that we should go into that in challenges for cause rather than in the general qualifications.

BY MS. BLAKE: Thank you, your Honor. Are there any other reasons that we have not gone into at this point that I have read to you from the sections that you feel are pertinent to bring to the court's attention at this time? In other words, if you have household duties, or family obligations,

such as a mother with very small children that would require you attendance at home. You want to bring that matter to the court's attention at this time. If you have been convicted of a felony, or if you're a qualified resident, does anyone have something that should be brought to the attention of the court at this time?

BY UNIDENTIFIED JUROR: I work nights. I get pretty tired in the morning. I don't think I can stay awake through this thing.

BY MS. BLAKE: Mr. Orslack.

BY MR. ORSLACK: That's the truth too. I ain't no spring chicken any more.

BY MS. BLAKE: May we approach the bench, your Honor for a moment?

(Bench conference held without reporter)

BY THE COURT: The County and Prosecuting Attorney had covered the matter as to whether of not if anyone has been convicted of a felony. I want them to come to the bench and let me know.

* * * * No further relevant matters transpired regarding this requested transcript, in re Roop. * * * *

Examination of potential juror Tom Roop by Ms. Blake:

Q Mr. Roop, you work for the City of Douglas, don't you?

A Yes, ma'am.

Q Do you have any contact with Glenrock in your work for the City of Douglas?

A No, ma'am.

Q At the time that this shooting occurred last year in October, did you read any of the newspaper accounts of that, Mr. Roop?

A Not that I recall. I may have seen the headlines, that's about it.

Q Simply the headlines?

A Yes, ma'am.

Q Have you ever discussed this case with anyone?

A No, ma'am.

Q Ever been mentioned to you in any form?

A Its been mentioned that the trial was coming up.

Q Is there anything in the headlines, or anything in this brief discussion that you described, anything what so ever Mr. Roop that would lead you to believe that the defendants are guilty, or innocent of the offense?

A No, ma'am.

Q In the event you're selected to sit as one of the final twelve jurors is there any reason why you could not be sequestered, would this create an undo hardship?

A Not as far as personally, I am not concerned. But, it would probably be in the Engineering Department.

Q Okay. How would that be, sir?

A We are short one construction supervisor. And, we have been doing work with the City Engineer.

Q And, in that work with the City Engineer is there anyone else that could carry on your duties, or take over for you?

A Oh, imagine there is.

Q So, there wouldn't be any irreparable damage by your being out two or three weeks?

A Not that I know of.

Q Let me ask you the same thing I was discussing with Miss Mason about capital punishment. You realize this is a capital case?

A Yes.

Q You realize in the event that the defendants are found guilty that their punishment would be considered. It does not have to be the death penalty, it could be life, do you understand that?

A Yes.

Q Do you have any opinions about capital punishment?

A No, ma'am.

Q In the proper case would you have any reservations in voting for the death penalty?

A If the evidence were there, no.

Q Do you know Mr. Roop of any reason why you could

not serve as a juror?

A Nothing other than I asked to be relieved by the City Engineer.

Q The City Engineer asked you to be relieved?

A Yes.

Q Is that your supervisor?

A Yes, ma'am.

Q Other than the inconvenience was there any other reason that he wanted you to be relieved?

A No, I do not know ma'am.

Q Okay. He didn't say why he wanted you relieved other than so you could take over your duties?

A Yes, ma'am.

Q You did say there could be someone else?

A I imagine they could call the Public Works.

Q Is there anything about your duties that would be bearing on your mind so heavily that you would not be able to give your full attention and consideration to the facts in this case?

A No, ma'am.

* * * * *

No further examination was made of Mr. Roop

STATE OF WYOMING)
) ss.
COUNTY OF CONVERSE)

CERTIFICATE OF REPORTER

I, Antonio H. Villela, do hereby certify that I served as the court reporter at the within hearing, that said hearing was held at the time and place therein mentioned; and that the above and foregoing transcript is a true and correct transcription of shorthand notes made and taken by me during the progress of said hearing. In testimony whereof, I have hereunto set my hand at Torrington, Wyoming, this 13th day of November, 1979.

/s/ Antonio H. Villela
Official Court Reporter
Pro Tempore

A. I don't believe I did, sir. If I did, it would probably have jogged my mind, in which time I would immediately have stepped forward.

Q. If you did not hear the qualification requirement and the questioning conducted during the first case, the Gorman case, because of your location in the Courtroom why did you sit there a second time you were called in for jury duty?

A. I didn't figure that as much jurors as was called that I would be called.

Q. Weren't you aware that a person convicted of a felony was not eligible to serve on jury duty prior to, didn't you know that fact prior to October 1, 1979?

A. I can't state for sure that I did.

Q. You indicated earlier that when you were released from the penitentiary you thought that your rights had been restored. Is that what you told us?

A. Evidently, I believed that or if there was anything that would have been derogatory on my character and stuff, that would have remained in my mind; but when I left that penitentiary I proceeded to block that part out prior to then and I started another life.

Q. At no time during the questioning of either the Gorman jury panel or the Parkhurst jury panel did you come forward and state that you had served time in the penitentiary? Did you?

A. You're correct.

Q. And didn't you indicate on a prior occasion that the reason you did, or did not do that is because you had simply forgotten about it?

A. Yes, sir, I did.

Q. In fact, Mr. Rupe, isn't it true that the first time you knew that a certificate of restoration had been issued for you to restore your citizenship rights, after your conviction back in 1950, was when you saw or participated in the Preliminary Hearing on 15 November 1979?

A. As I stated, when I left the penitentiary I was handed several papers. I cannot tell you what they were. I remember

them handing me a $5.00 bill and giving me the money that I had put aside while I was in there, and I left there; and then from that day 'till the day of the hearing I had never seen one of those papers.

Q. And, in fact, you even, as late as the 5th of February, 1981, did not ever remember that document being given to you, did you?

A. As I say, I do not remember the docket or document as such being precisely handed to me or pointed out to me or anything of that sort.

Q. And you were not aware of the Governor taking any action to pardon you from the fraudulent check charge, were you?

A. No. As I stated, I may have read them papers, stuck them in a suitcase or ash can, whatever, when I left there and from that day to this I had never seen them papers, or to the date of the hearing.

Q. And from the time of the jury selection in the Gorman and Parkhurst cases, you didn't remember anything about those papers, did you?

A. No, sir, I did not.

Q. And you didn't know that a certificate had been issued?

A. No, sir, I did not.

Q. Now, you're not aware of any evidence that the Defendants in this case, Miss Blake and Mr. Dekmar, acted with malice or maliciously toward you, are you?

A. I have no access to any of their evidence, sir.

Q. You're not aware of any evidence to that effect, are you?

THE COURT: Counsel, I think that's a question for the jury to decide, based on the evidence introduced here today. I don't think the question is proper.

Q. (By Mr. Applegate) Are you aware of any evidence that Miss Blake and Mr. Dekmar knew that your citizenship rights had been restored prior to the 11th of October, 1979?

A. Miss Blake, Mr. Dekmar had the same access to the state records that my attorneys had. I feel that that should

have been part of their evidence, yes.

Q. You're not aware of any evidence that they knew that, though, are you?

A. I don't have access to the County Attorney's evidence records.

Q. Now, isn't it true that the loss of sleep that you had, that you talked about, only lasted for something less than three or four months, 15 to 20 weeks?

A. It still exists, sir.

Q. Do you recall the giving of your Deposition in Mr. Hunkins's office on the 5th of February, 1981?

A. I do.

Q. Do you recall saying in the Deposition that, talking about the subject of sleeplessness —

A. — Yes, sir —

Q. —and do you remember saying there, in answer to the question that this happened to you about, maybe about three nights a week and for a period of maybe three to four months?

A. That is a fact, those three to four months in question, yes.

Q. You signed some interrogatory answers in this case, did you not? Written questions to which you gave written answers? Do you recall that?

A. I believe so.

Q. And isn't it true that your answers to those interrogatories provided that, or you made an answer to those interrogatories that your attorney, on November the 12th, 1979, contacted the penitentiary and was referred to the State Archives, Mrs. Yelvington, and was informed by her that she possessed the records which reflected that your citizenship rights had been restored? Do you recall an answer like that to your interrogatories?

A. No, I do not recall it.

Q. Do you remember signing a page that looked like that within the last couple of weeks.?

A. I believe so.

Q. And those, you signed that before a Notary Public,

didn't you? It was notarized? Your signature was notarized?

A. If it was required, yes, it was.

Q. And did you look through the pages, the papers that you signed before you did it?

A. Always.

THE COURT: Counsel, here's the file.

MR. APPLEGATE: Thank you, Your Honor.

Q. (BY MR. APPLEGATE) I am handing you the Court file requesting the answers to interrogatories filed the 25th, I believe it is, of March, 1981, that's answers to interrogatories.

(WHEREUPON, Mr. Applegate tendered document to witness.)

A. (BY MR. RUPE) Yes, sir.

Q. Would you look at the last page of that document, page 5, and see if you recognize your signature?

A. That's my signature, 25th day of March, 1981.

Q. And that was signed before a Notary Public?

A. Maxine Sundquist.

Q. Clerk of the —

A. — District Court, yes.

Q. Now, referring to number 8 there, would you read that?

A. Number 8?

Q. Excuse me. That's the next page over, question number 8, bottom of that page 4.

A. Please describe —

Q. I don't need to have you read it. Would you just look at it briefly and see if that refreshes your recollection?

A. On or about November 12th.

Q. And so at that time you indicated that —

A. — On or about the —

Q. — The 12th, Mr. Hunkins contacted Mrs. Yelvington?

A. It could have been the 13th or 14th, it could have been the 10th. I do not know.

Q. But whatever date it was, before the 15th November hearing?

A. Correct.